

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

T-MOBILE USA, INC., a Delaware  
corporation,

Plaintiff,

v.

HUAWEI DEVICE USA, INC., a Texas  
corporation.

Defendants.

NO. C14-1351 RAJ

**DEFENDANT HUAWEI DEVICE USA,  
INC.'S TRIAL BRIEF**

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1 In the past week, Plaintiff T-Mobile USA has attempted to radically re-orient this case to  
 2 hold Huawei Device USA liable for alleged unjust enrichment to upstream corporate entities –  
 3 particularly Huawei Device USA’s grandparent company, Huawei Device China – that are not  
 4 defendants in this case. On the due date of the Pretrial Order (January 30, 2017), T-Mobile  
 5 revised its statements of claims and legal issues to include questions relating to joint and several  
 6 liability under “acting in concert,” alter ego, and conspiracy theories. These concepts were not  
 7 pled, were never previously addressed in this case, and were never the subject of discovery.

8 Later last week, T-Mobile revised its draft proposed jury instructions to include, for the  
 9 first time, a statement that the jury may hold Huawei Device USA liable for the unjust  
 10 enrichment of “entities acting in concert with” it. This evening, T-Mobile again revised its  
 11 instructions to assert that Huawei Device USA is liable for unjust enrichment accruing to its  
 12 affiliates. On this basis, T-Mobile now seeks to recover against Huawei Device USA unjust  
 13 enrichment allegedly accruing to Huawei Device China, an entity T-Mobile chose not to sue. T-  
 14 Mobile’s eleventh-hour reconstruction of its case is at odds with the law and, if permitted, would  
 15 severely prejudice Huawei Device USA and dramatically enlarge the scope of trial.

16 T-Mobile’s gambit also exacerbates the prejudicial effect of its misreading of unjust  
 17 enrichment law, which was defective even before T-Mobile attempted to hold Huawei Device  
 18 USA liable for the purported enrichment of nonparties. In contravention of Washington  
 19 precedent and the applicable pattern jury instruction, T-Mobile has taken the position that it can  
 20 meet its burden to establish unjust enrichment simply by pointing to sales (full stop), whereupon  
 21 the burden shifts to Huawei Device USA to prove that the sales were not attributable to  
 22 misappropriation. This is wrong. Under Washington law, T-Mobile bears the burden of  
 23 identifying sales *attributable to misappropriation*, whereupon the burden shifts to Huawei  
 24 Device USA to identify the *portion* of those sales not attributable to misappropriation or that do  
 25 not constitute profits. T-Mobile’s interpretation of the law was wrong before, but it comes into  
 26 sharper focus now that T-Mobile contends that it need merely identify the worldwide sales of  
 27

1 other nonparty Huawei entities – dozens of entities with over one hundred thousand employees  
 2 and billions in annual sales – before the burden shifts to Huawei Device USA to prove that every  
 3 Huawei entity’s worldwide sales were not attributable to the misappropriation.

4 T-Mobile also misinterprets unjust enrichment law by contending that the jury may, as an  
 5 alternative form of unjust enrichment, award it a reasonable royalty on its misappropriation and  
 6 breach claims. Washington’s trade secret statute precludes an award of a reasonable royalty as a  
 7 measure of damages. The Washington legislature has clearly and unambiguously stated that only  
 8 the *Court* may award a reasonable royalty and only as part of an injunction order. Further, a  
 9 reasonable royalty is not an appropriate measure of contract damages as a matter of law.  
 10 Restitution damages are available in Washington only when the injured party, *i.e.*, T-Mobile, has  
 11 remaining duties to perform under the contract. As both parties acknowledge, the contracts at  
 12 issue here have now expired.

13 Finally, T-Mobile should not be permitted to re-write either its liability theories or its  
 14 experts’ opinions now that Huawei Device USA is the sole defendant. There are substantial gaps  
 15 in T-Mobile’s proof that Huawei Device USA benefitted from use of T-Mobile’s alleged trade  
 16 secrets. T-Mobile’s expert Michael Davies does not even mention Huawei Device USA in his  
 17 report, much less suggest use or copying of the trade secrets by Huawei Device USA. Nor does  
 18 Mr. Davies connect his opinions regarding alleged use of T-Mobile information in China with  
 19 Huawei Device USA or to the improvement of any phone sold by Huawei Device USA.

## 20 **BACKGROUND**

21 This is not a competitor-versus-competitor case but a dispute between a large  
 22 telecommunications service provider, T-Mobile USA, and its former supplier, Huawei Device  
 23 USA. At the time, T-Mobile USA was Huawei Device USA’s biggest customer and the key  
 24 focus of Huawei Device USA’s efforts. But the relationship soured after a series of disputes  
 25 centered around Huawei Device USA’s attempts to support and expand its business with T-  
 26 Mobile. The disputes resulted in T-Mobile’s allegations of trade secret misappropriation and  
 27

1 breach of contract against Huawei Device USA.

2 When T-Mobile USA filed this case, it sued two distinct corporate entities: Huawei  
3 Technologies Co. Ltd., a Chinese company based in Shenzhen, and Huawei Device USA, an  
4 indirect Texas subsidiary. ECF No. 1 (Compl.) ¶¶ 24-25. T-Mobile sought as relief on its  
5 misappropriation claim “damages in the amount of T-Mobile’s actual losses and Huawei’s unjust  
6 enrichment,” and defined “Huawei” as Huawei Device USA, Inc. (“Huawei USA”) and Huawei  
7 Technologies Co. LTD.” *Id.* at 1, 21 (Pmbl. & Prayer for Relief).

8 T-Mobile never attempted to sue Huawei Device Co., Ltd. – the direct subsidiary of  
9 Huawei Technologies and the Chinese grandparent of Huawei Device USA. *See id.*; Dkt. 253  
10 ¶ 3. T-Mobile made this pleading decision despite knowing that Huawei Device Co. Ltd.  
11 (“Huawei Device China”) developed and manufactured the handsets that Huawei Device USA  
12 sold to T-Mobile, and employed most of the individuals accused of wrongdoing in this case. In  
13 its April 20, 2015 Motion to Dismiss and in supporting declarations, Huawei Technologies stated  
14 unequivocally:

15 Huawei Technologies was not involved in the actions set forth in  
16 the Complaint. At no time relevant to the allegations in the  
17 Complaint did Huawei Technologies employ either of the two  
18 individuals T-Mobile identifies as having misappropriated its  
19 alleged trade secret(s) or any of the other individuals identified in  
20 the Complaint. At no time did Huawei Technologies engage in  
21 any of the activities alleged in the Complaint. Moreover, Huawei  
22 Technologies, which does not develop, manufacture, or sell  
23 handsets, was never a signatory or party-in-interest to any of the  
24 contracts T-Mobile identifies in the Complaint.

25 ECF No. 50 at 6; *see also* ECF No. 51 at ¶¶ 11-19; ECF No. 59 at 1; ECF No. 250 at 2-3.

26 T-Mobile did not amend its Complaint before the Court-imposed deadline of December  
27 23, 2015, ECF No. 41, and proceeded to summary judgment on the theory that it could obtain  
28 complete relief from Huawei Device USA and its great-grandparent, Huawei Technologies. On  
January 26, 2017, however, this Court granted summary judgment to Huawei Technologies for  
lack of personal jurisdiction, holding that “T-Mobile cannot carry its burden to show, by a

preponderance of the evidence, that Huawei Technologies committed an intentional act expressly aimed at Washington causing harm in that state.” ECF No. 334 at 11. As a result, T-Mobile will proceed to trial against one defendant: Huawei Device USA.

In an attempt to evade the consequences of its pleading choices and to expand the scope and presentation of evidence at trial, T-Mobile has announced, on the eve of trial, that it intends to pursue a novel theory of the case: to wit, that Huawei Device USA should be held liable for any damages and unjust enrichment “caused by Huawei Device USA *in concert with its corporate family*, including, but not limited to, Huawei Device China.” ECF No. 348 at 2:11-14 (emphasis added). T-Mobile takes the position that, although it never sued Huawei Device China, it may hold Huawei Device USA liable for all the acts and purported damages caused by other Huawei entities and, in addition, recover the unjust enrichment of all Huawei entities from the single Huawei entity now a defendant.

T-Mobile’s allegations suffer from factual and legal defects. To that end, Huawei Device USA submits the following arguments for the Court’s consideration.

### ARGUMENT

#### **I. T-Mobile Seeks to Expand this Case to Recover Damages that Were Not Pleaded in Its Complaint and Are Not Authorized By Law**

##### **A. T-Mobile Cannot Recover from Huawei Device USA Benefits Obtained by Other Entities**

T-Mobile’s strategic decision to limit its Complaint to one American subsidiary and a great-grandparent over which jurisdiction is lacking has serious consequences for T-Mobile’s trade secret case. To establish trade secret misappropriation under Washington law, T-Mobile bears the burden of proving, *inter alia*, (1) that T-Mobile had a trade secret; (2) that Huawei Device USA misappropriated the trade secret; and (3) that Huawei Device USA’s misappropriation was a proximate cause of damages to T-Mobile and/or that, as a result of the misappropriation, Huawei Device USA received money or benefits that in justice and fairness belong to T-Mobile. WPI 351.01 (2013). Yet, T-Mobile now seeks to recover unjust enrichment

1 allegedly received by *other* Huawei entities on a theory of joint and several liability asserted on  
 2 the eve of trial. This novel theory was waived and is, in any event, not actionable as a matter of  
 3 law.

4 **1. Huawei Device USA Can Be Liable Only for the Amounts by Which It**  
 5 **Was Unjustly Enriched**

6 “Unjust enrichment occurs when one retains money or benefits which in justice and  
 7 equity belong to another.” *Bailie Communications v. Trend Business Systems*, 810 P.2d 12, 16  
 8 (Wash. App. 1991). Courts have considered and rejected the proposition that a corporate entity  
 9 may be held responsible for the unjust enrichment conferred on its affiliates. *See Montanez v.*  
 10 *HSBC Mortg. Corp. (USA)*, 876 F. Supp. 2d 504, 517 (E.D. Pa. 2012) (rejecting unjust  
 11 enrichment claim against corporate entity that did not receive any benefit though it allegedly  
 12 participated in the unlawful scheme along with its affiliates).

13 The Restatement (Third) of Restitution and Unjust Enrichment – which has been adopted  
 14 by the Washington courts, *see Cox v. O’Brien*, 150 Wash. App. 24, 36-37 (2009) – makes clear  
 15 that a plaintiff entitled to restitution is limited to “a judgment for money in the amount of the  
 16 *defendant’s* unjust enrichment.” *Id.* § 49(1) (2011) (emphasis added); *see also id.* § 42 cmt. b  
 17 (“There is no unjust enrichment (and no claim by the rule of § 42) unless the *defendant* has  
 18 obtained a benefit in violation of the claimant’s right to exclude others from the interests in  
 19 question.”) (emphasis added).

20 The Restatement provision concerning interference with intellectual property and similar  
 21 rights – the very provision implicated in this case – provides two illustrations confirming that a  
 22 plaintiff may not obtain from the defendant benefits conferred on a co-defendant or nonparty. In  
 23 one example, the Restatement explains that, if a Publisher copies a chapter of an Author’s work  
 24 and the infringing work is printed by a Printer, both the Publisher and Printer may be jointly  
 25 liable for the Author’s *actual* damages. *Id.* § 42 illus. 8 (2011). But the Printer is *not* liable for  
 26 any unjust enrichment conferred upon the Publisher. *Id.* Likewise, if a Competitor hires an  
 27 Engineer from Seller and induces him to divulge the Seller’s trade secrets, the Engineer may be

1 jointly liable for actual damages, but not for the Competitor's unjust enrichment. *Id.* illus. 11.

2 Over the past week, T-Mobile's draft jury instructions have changed to assert for the first  
3 time that Huawei Device USA is liable for alleged unjust enrichment to its affiliates. First, in  
4 revised instructions circulated last week, T-Mobile suggested that, under the doctrine of joint and  
5 several liability, it may recover from Huawei Device USA benefits obtained by by other entities  
6 with which it was "acting in concert." This is wrong as a matter of law. The purpose of joint  
7 and several liability is to permit a plaintiff to obtain a full "recovery for *his injuries*" where  
8 multiple defendants are at fault. *Rudelson v. United States*, 602 F.2d 1326, 1332 (9th Cir. 1979)  
9 (emphasis added). Thus, the pattern instruction on which T-Mobile relies imposes joint liability  
10 where two parties "were acting in concert" and their joint "act or omission was a proximate  
11 cause of the plaintiff's *injuries*." WPI 50.21<sup>1</sup> (emphasis added) (cited in T-Mobile Proposed  
12 Instructions at XX). That rationale has no application to unjust enrichment, which is not  
13 designed to compensate the plaintiff but to deprive the defendant of benefits *it* received at the  
14 plaintiff's expense. *See Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wash. App. 474,  
15 490 (2011).

16 While parties sued for actual damages "may be held jointly liable in tort," "only those  
17 who have benefited" are liable for unjust enrichment, "and then only to the extent thereof."  
18 *Myzel v. Fields*, 386 F.2d 718, 744 (8th Cir. 1967). In short, unjust enrichment is not subject to  
19 joint and several liability because unjust enrichment must be "based upon a calculation of each  
20 defendant's *own* profits from misappropriation." *Mike's Train House, Inc. v. Lionel L.L.C.*, No.  
21 00 Civ. 71729(JCO), 2004 WL 2472644, at \*3 (E.D. Mich. Nov. 1, 2004); *see also Erausquin v.*  
22 *Notz, Stucki Mgmt. (Bermuda) Ltd.*, 806 F. Supp. 2d 712, 722 n.6 (S.D.N.Y. 2011) (rejecting

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23 <sup>1</sup> T-Mobile's proposed instruction is based on a statute that does not apply in this case.  
24 The relevant joint and several liability statute is RCW § 4.22.030, which imposes joint and  
25 several liability "if more than one person is liable to a claimant on an indivisible claim for the  
26 same injury...." But any unjust enrichment of Huawei Device USA *is* divisible from any unjust  
27 enrichment to other Huawei entities. Indeed, T-Mobile's expert has identified the purported  
unjust enrichment to Huawei Device USA, as distinguished from non-USA entities. *See* ECF  
No. 273-8 at 131.



1 argument for joint and several liability on a claim for unjust enrichment on the ground that  
 2 “[j]oint and several liability is a tort principle”); *Bankers Trust Co. v. Dukes*, No. 97 Civ.  
 3 1417(CCN), 1997 WL 727616, at \*6 (E.D. Pa. Nov. 21, 1997) (finding that defendant is “not  
 4 jointly and severally liable for the unjust enrichment of all the members of the conspiracy”);  
 5 *Phoenix Airline Servs., Inc. v. Metro Airlines, Inc.*, 390 S.E.2d 219, 226 (Ga. App. 1989), *rev’d*  
 6 *on other grounds*, 397 S.E.2d 699 (1990) (noting that application of joint and several liability  
 7 “would appear to be of doubtful applicability where the sole purpose of the award is to prevent  
 8 unjust enrichment rather than to compensate a claimant for actual loss”).<sup>2</sup>

9 Then, this evening, the day jury instructions were due, T-Mobile revised its instructions  
 10 to largely abandon its “acting in concert” theory in favor of the notion that Huawei Device USA  
 11 is automatically liable for unjust enrichment accruing to its “related corporate entities.” This  
 12 also is not the law.

13 Under Washington law, a parent company may be liable for unjust enrichment based on  
 14 the wrongful acts of its subsidiary if, and only if, “the subsidiary is liquidated and its affairs are  
 15 settled.” *In re Washington Mut., Inc.*, 418 B.R. 107, 113 (Bankr. D. Del. 2009) (applying  
 16 Washington law); *see also United States v. Dean Van Lines, Inc.*, 531 F.2d 289, 293 (5th Cir.

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18 <sup>2</sup> In the Monday night version of the Pretrial Order, T-Mobile cited *Salton, Inc. v. Philips*  
 19 *Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 877 (7th Cir. 2005), for the principle that  
 20 “joint and several liability ... governs ... the common law tort of misappropriation of trade  
 21 secrets.” *Salton*, however, concerned a different question than the one presented here – to wit,  
 22 whether a potential co-defendant was an “indispensible party” (sic) in a case for trade secret  
 23 misappropriation. *Salton’s dicta* is not even relevant to the question here – whether one  
 24 defendant can be liable for another’s unjust enrichment, not just the plaintiff’s damages.

25 T-Mobile has also suggested that *Allied Erecting & Dismantling Co. v. Genesis Equip. &*  
 26 *Manufac., Inc.*, 511 Fed. Appx. 398 (6th Cir. 2013), supports joint and several liability for unjust  
 27 enrichment damages. In that case, however, the defendants were before the Court and never  
 28 challenged application of the unjust enrichment award to both. *See id.*; *Allied Erecting &*  
*Dismantling Co. v. Genesis Equip. & Mfg., Inc.*, No. 4:06CV114, 2010 WL 4818367, at \*14  
 (N.D. Ohio Nov. 19, 2010). The trial court overturned the unjust enrichment award on other  
 grounds, and in reversing that decision, the Sixth Circuit did not address whether a defendant  
 may be jointly and severally liable for the benefit obtained by another entity. *See Fields v.*  
*Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187, 1190 (9th Cir. 2006).

1976). In that limited circumstance, it is appropriate to hold the parent company liable because the unjust enrichment conferred on its subsidiary has already flowed to the parent company's shareholders. *See id.* But that limited principle has no application here, where T-Mobile seeks to hold a *subsidiary* liable for the unjust enrichment conferred on *existing* upstream entities. "[S]uch a 'theory would eviscerate [the] long established respect for the corporate form' because it would mean that 'whenever a corporation is liable for some unlawful activity, any [affiliate] of that corporation ... could be liable on a claim of unjust enrichment.'" *N. Cent. EMS Corp. v. Bound Tree Med., LLC*, No. CV 15-2793 (JRT/LIB), 2016 WL 544472, at \*10 (D. Minn. Feb. 10, 2016); *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 921 F. Supp. 2d 56, 89–90 (S.D.N.Y. 2013) (same); *cf. State, Dep't of Revenue v. Nord Nw. Corp.*, 164 Wash. App. 215, 230 (2011) ("It is well settled that a parent and subsidiary are for legal purposes generally treated as separate entities."). In short, if T-Mobile seeks to recover unjust enrichment conferred on Huawei Technologies, Huawei Device China, or any other Huawei entity, T-Mobile must sue that distinct corporate entity (in the proper forum). But it is too late for T-Mobile to do so here.

Indeed, in its proposed jury instructions, T-Mobile does not cite a single case in which an entity was held liable for unjust enrichment accruing to another under principles of joint and several liability. T-Mobile primarily relies *Mangren R&D Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 945-46 (7th Cir. 1995). But that case involved an award of actual damages in the form of the *plaintiff's* lost sales, not unjust enrichment to the defendant. *See id.* ("[Plaintiff] Mangren demonstrated to the jury's satisfaction that absent defendants' misappropriation, it would have made the sales ultimately made by Bash. . . . A reasonable jury could therefore conclude that but for defendants' misappropriation, Mangren would have made the disputed sales.")<sup>3</sup> By contrast,

<sup>3</sup> T-Mobile also argues that, because a plaintiff "may recover for the unjust enrichment caused by misappropriation," RCW 19.108.030, it may recover from Huawei Device USA "regardless of whether the unjust enrichment accrued to a third party." This misreads the statute. The reference to unjust enrichment "caused by" misappropriation *limits* its scope by imposing a causation requirement – just as the statute limits a plaintiff to "the actual loss caused by misappropriation." Although the statute does not specify "plaintiff's" actual loss or "defendant's" unjust enrichment, plaintiffs cannot recover unjust enrichment flowing to third

relevant authority holds that defendants are not liable for unjust enrichment accruing to third parties. *See, e.g., Montanez*, 876 F. Supp. 2d at 517; *Mike's Train House*, 2004 WL 2472644, at \*3.

## 2. It Is Too Late for T-Mobile to Seek to Hold Huawei Device USA Liable for Benefits to Huawei Device China

Regardless of the merits, T-Mobile waived its novel theories of joint and several liability and benefit to “related corporate entities” by failing to allege them in the Complaint. It is well-settled that a party may not proceed to trial on “an unpleaded theory of recovery” without “express or implied consent of the parties.” *Pinkley, Inc. v. City of Frederick, MD.*, 191 F.3d 394, 401 (4th Cir. 1999). As the court explained in *Kirby v. City of Tacoma*, 124 Wash. App. 454, 472 (2004), “[a] party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.” Yet, that is precisely what T-Mobile seeks to do here.

T-Mobile’s Complaint never uses the words “acting in concert” or “joint and several liability.” Not only did T-Mobile fail to bring any claim or count asserting that Huawei Device USA should be held vicariously liable for the conduct of its affiliates. Instead, T-Mobile limited its request for unjust enrichment to “Huawei’s unjust enrichment,” with “Huawei” defined as “Huawei Device USA, Inc. (“Huawei USA”) and Huawei Technologies Co. LTD.” Dkt. 1 at 1, 21 (Compl. at Pmbl. & Prayer for Relief). Huawei Technologies is now out of the case, leaving only Huawei Device USA.<sup>4</sup>

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parties any more than they can recover actual losses that have been suffered by third parties. *See* WPI 351.01 (requiring that “defendant[] received money or benefits that in justice and fairness belong to . . . plaintiff[]”). WPI 351.01; *Bailie Communications*, 810 P.2d at 16 (“Unjust enrichment occurs when *one retains* money or benefits which in justice and equity belong to another.” (emphasis added)).

<sup>4</sup> In its Complaint, T-Mobile vaguely alleged, on information and belief, that “*each of the Defendants* was the agent, servant and employee, co-venturer, alter ego, and co-conspirator *of the other*, and was at all times herein mentioned, acting within the course, scope, and purpose of such agency, employment, joint venture, and conspiracy, and with the consent, knowledge, ratification, and authorization of such agency, employment, joint venture, and conspiracy.” ECF No. 1 ¶ 26 (emphasis added). But Huawei Device China was never a defendant in this case, so

1 It is now the eve of trial, and the statute of limitations, as well as the deadline for  
 2 amending the pleadings, has long since run. *See* ECF No. 41. Huawei Device USA was entitled  
 3 to be notified at the outset of this case if T-Mobile intended to hold Device USA jointly and  
 4 severally liable for unjust enrichment accruing to its affiliates. *See* 9 Wash. Prac., Civil  
 5 Procedure Forms § 8.34 cmt. (3d ed. 2016) (observing that plaintiffs “have the responsibility of  
 6 alleging a joint and several liability theory against the defendants as a separate claim in the  
 7 complaint”). Instead, T-Mobile first broached this concept the afternoon the Pretrial Order was  
 8 due, and amended its draft proposed jury instructions to include it only last Thursday evening.  
 9 Because “joint and several liability ... must be pleaded to be actionable at trial,” *United States v.*  
 10 *Cochran*, 79 F. Supp. 3d 578, 585 (E.D.N.C. 2015), and because T-Mobile has never alleged  
 11 joint and several liability as between Huawei Device USA and Huawei Device China, it cannot  
 12 do so now.

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13 this allegation cannot be read to assert any agency, alter ego relationship, or conspiracy with  
 14 Huawei Device China or any other Huawei entity. Nor would T-Mobile’s summary allegation  
 15 be sufficient to put Huawei Device USA on notice of a full blown alter ego or conspiracy claim  
 16 for relief.

16 In any event, Huawei Device USA could not have “conspired” with Huawei Device  
 17 China as a matter of law. Huawei Device USA is a wholly-owned subsidiary of Huawei Device  
 18 China. The Washington Supreme Court has precluded “the possibility of establishing a  
 19 conspiracy between a parent corporation ... and its wholly-controlled subsidiary....” *Corbit v. J.*  
 20 *I. Case Co.*, 70 Wash. 2d 522, 528 n.3 (1967).

19 And T-Mobile’s suggestion that Huawei Device USA (the subsidiary) may be held liable  
 20 as the principal for its grand-parent and great-grandparent entities, as agents, is fanciful. Under  
 21 common law principles, control is the *sine qua non* of agency. *See* Restatement (Third) Of  
 22 Agency § 1.01 cmt. c (2006) (“A relationship is not one of agency within the common-law  
 23 definition unless ... the principal has the right ... to control the agent’s acts.”). There is no  
 24 evidence that Huawei Device USA ever controlled the acts of Huawei Device China or Huawei  
 25 Technologies.

23 That leaves alter ego liability, which applies only “when ‘the corporate entity has been  
 24 disregarded by the principals themselves so that there is such a unity of ownership and interest  
 25 that the separateness of the corporation has ceased to exist.’” *Grayson v. Nordic Constr. Co.*, 92  
 26 Wash.2d 548, 553 (1979) (citation omitted). Again, there is no evidence that Huawei Device  
 27 USA and any other Huawei entity “were attempting to perpetrate a fraud on [T-Mobile] by  
 28 maintaining separate identities.” *Minton v. Ralston Purina Co.*, 146 Wash. 2d 385, 399 (2002).  
 Thus, all of T-Mobile’s alleged bases for vicarious liability would fail as a matter of law or fact,  
 even if its Complaint were properly pled.

**B. T-Mobile Must Prove Sales Attributable to the Trade Secret Theft Before the Burden Shifts Back to Huawei Device USA**

The prejudicial impact of T-Mobile’s novel and far-reaching theory of damages is compounded by its position that, to recover unjust enrichment, it need only identify Huawei’s sales, whereupon the burden shifts to Huawei Device USA to prove that the sales are not attributable to misappropriation. T-Mobile’s position effectively shifts the burden of causation in a trade secret case to the defendant and cannot be squared with Washington law.

Washington’s jury instructions explain the appropriate burden-shifting scheme as follows: “once the plaintiff proves sales *attributable to the use of a trade secret*, the burden shifts to the defendant to establish ‘any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.’” WPI 351.01 cmt. (quoting *Petters v. Williamson & Assocs., Inc.*, 151 Wn.App. 154, 165 (2009)) (emphasis added); *see also* 4-15 Milgrim on Trade Secrets § 15.02[3][i] (2016) (plaintiff’s burden is “to establish that the defendant achieved revenues *from use of the trade secret*” (emphasis added)). This formulation makes ample sense. The plaintiff bears the burden of proving a causal link between the alleged misappropriation and the defendant’s enrichment, and the defendant then bears the burden of demonstrating that a *portion* of the sale is attributable to some other factor, such as other features of the product, sales and marketing techniques, and reputation and goodwill.

As the Washington Court of Appeals held in *Petters*, the burden shifts to the defendant only after the plaintiff has identified that portion of defendant’s total revenue that was “wrongfully obtained.” 210 P.3d at 1054 (“burden is on the misappropriating party to prove that any portion of the *wrongfully obtained* revenue is not attributable to the misappropriation”). Specifically, “the defendant [has] the burden of demonstrating which portion, if any, of the revenue obtained through the transfer of a trade secret was not, in fact, attributable to the transfer.” *Id.* In other words, the plaintiff must identify not just the defendant’s total revenue, but the portion of revenue obtained as a result of the misappropriation, at which point the defendant must “explain why any *particular portion* of the money that it received as a result of

1 the misappropriating transaction should not be considered.” *Id.* (emphasis added). Thus, in  
 2 *Petters*, the plaintiff “met his burden of demonstrating the total value” not of defendant’s sales  
 3 but of a particular contract secured with the plaintiff’s trade secret. *Id.*

4 In arguing otherwise, T-Mobile relies upon comment f to Restatement (Third) of Unfair  
 5 Competition § 45, which provides that “The traditional form of restitutionary relief in an action  
 6 for the appropriation of a trade secret is an accounting of the defendant’s profits on sales  
 7 attributable to the use of the trade secret. . . . The plaintiff has the burden of establishing the  
 8 defendant’s sales; the defendant has the burden of establishing any portion of the sales not  
 9 attributable to the trade secret and any expenses to be deducted in determining net profits.”  
 10 According to T-Mobile, this means the plaintiff need only establish sales period, not sales  
 11 attributable to the use of a trade secret.

12 While the Restatement is arguably ambiguous on the point, the cases cited in the  
 13 Restatement itself and case law interpreting it make clear that a plaintiff cannot carry its burden  
 14 merely by establishing sales untethered to the use of a trade secret. The Restatement, for  
 15 example, directs readers to *USM Corp. v. Marson Fastener Corp.*, 392 Mass. 334 (1984), as a  
 16 case properly applying the burden shifting scheme. Restatement (Third) of Unfair Competition  
 17 § 45 Reporter’s Notes. In that case, however, the court held that “[o]nce a plaintiff demonstrates  
 18 that a defendant made a profit from the sale of products *produced by improper use of a trade*  
 19 *secret*, the burden shifts to the defendant to demonstrate those costs properly to be offset against  
 20 its profit and the portion of its profit attributable to factors other than the trade secret.” 392  
 21 Mass. at 338. The court did not hold, as T-Mobile would have it, that proof of sales is itself  
 22 sufficient.<sup>5</sup>

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23  
 24 <sup>5</sup> In its summary judgment papers, T-Mobile relied on *Ada Motors v. Butler*, 183 Wn.  
 25 App. 1002, 2014 WL 4067876, at \*2-3 (Aug. 18, 2014), to suggest that the plaintiff’s only  
 26 obligation is to show total sales, not sales attributable to the misappropriation. But *Ada Motors*  
 27 contrasted “sales” and “damages from sales,” not total sales versus sales attributable to the  
 misappropriation. The opinion acknowledges that the plaintiff has the “burden to prove that the  
 misappropriation of a trade secret proximately caused the sales at issue.” *Id.* at \*3.



Cases interpreting the Restatement have adopted this view. Under this precedent, the plaintiff must “demonstrate[] that a defendant made a profit from the sale of products produced by improper use of a trade secret,” and only then does the burden shift to the defendant. *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 249 F. App’x 63, 79 (10th Cir. 2007) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1174 n.48 (1st Cir. 1994)); *see also Curtis Mfg. Co. v. Plasti-Clip Corp.*, 933 F. Supp. 94, 104 (D.N.H. 1995) (“Once the plaintiffs demonstrate that the defendants have made profits from sales of products incorporating the misappropriated trade secrets, the burden shifts to the defendants to demonstrate the portion of their profits which is not attributable to the trade secrets.”).<sup>6</sup>

### C. A Reasonable Royalty Is Not Available as a Form of Damages

Because T-Mobile’s unjust enrichment award must be limited to the benefit unjustly conferred on Huawei Device USA, if any, T-Mobile continues to press its theory that the jury may award a reasonable royalty as an alternative form of disgorgement. Thus, T-Mobile seeks a jury instruction providing that, “[a]s an alternative means of calculating unjust enrichment, you may award a reasonable royalty.”

The Washington legislature, however, has expressly limited a jury’s damages award to “actual loss caused by the misappropriation” and “unjust enrichment.” Wash. Rev. Stat. § 19.108.030(1). In 1985, the model Uniform Trade Secrets Act was amended to specifically provide for a reasonable royalty measure of past damages. *See* Uniform Trade Secrets Act § 3 (1985) (“In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret.”). But the Washington legislature never amended Washington’s trade secret statute to include a reasonable royalty as an

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<sup>6</sup> Not even T-Mobile’s own unjust enrichment expert premised his report on the notion that T-Mobile need only point to Huawei’s sales. While his analysis is defective and unreliable, Dr. Sullivan purports to identify a particular volume of increased sales that he attributes to improved device quality. *See* Dkt. 285, Ex. 48 § 6.3.

1 appropriate measure of damages. T-Mobile cannot by fiat rewrite the Washington statute's  
 2 unambiguous language. *See Xi v. U.S. I.N.S.*, 298 F.3d 832, 839 (9th Cir. 2002) (“a decision to  
 3 [rearrange] or rewrite the statute falls within the legislative, not the judicial, prerogative”).

4       Rewriting Washington trade secrets law in the manner T-Mobile suggests would be  
 5 particularly inappropriate because the legislature has considered the role of a reasonable royalty  
 6 in a trade secret case and determined that a royalty may be awarded, but only by the Court and  
 7 only in a limited circumstance. As the Court recognized in its summary judgment order, the  
 8 Washington Uniform Trade Secrets act permits the Court to issue an injunction conditioning  
 9 future use upon payment of a reasonable royalty “for no longer than the period of time the use  
 10 could have been prohibited.” Dkt. 334 at 22:15-19 (quoting Wash. Rev. Stat. § 19.108.020(2)).  
 11 T-Mobile’s proposed “lump sum” royalty – based on hypothetical rather than actual use – is at  
 12 odds with this conditional royalty approach and would sidestep the fact that Huawei does not  
 13 continue to use the technology in suit. The Washington legislature’s decision to permit a  
 14 reasonable royalty (by the court) in one circumstance, but not as an alternative measure of  
 15 damages, must be respected. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312–13 (9th  
 16 Cir. 1992); *O’Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994).<sup>7</sup>

17       The imprudence of rewriting Washington law is particularly apparent in the context of a  
 18 reasonable royalty, as different state legislatures have reached different conclusions about the  
 19 availability of royalty damages in the trade secret context. T-Mobile asks the Court to submit the  
 20 question of reasonable royalty to the jury, without limitation. But there is no basis for assuming  
 21 that the Washington legislature would endorse that approach even if it did adopt a reasonable  
 22 royalty as a basis for trade secret damages. In California, for example, a royalty is available to  
 23 the plaintiff but must be ordered by the *court* and only “[i]f neither damages nor unjust

24  
 25 <sup>7</sup> The non-binding decision in *Veritas Operating Corp. v. Microsoft Corp.*, No. C06-  
 26 0703, 2008 WL 7404617, at \*2 (W.D. Wash. Feb. 26, 2008), does not address these principles  
 27 and is not a reliable predictor of how the Washington Supreme Court would decide the issue. *See*  
*Matsuura v. Alston & Bird*, 166 F.3d 1006, 1009 n.3 (9th Cir. 1999).



1 enrichment ... are provable.” Cal. Civ. Code § 3426.3(b). If Washington is to permit a trade  
 2 secret plaintiff to recover a reasonable royalty for past harm, it will be the legislature’s job to  
 3 enact the rule and decide on its proper contours. It is not T-Mobile’s prerogative to write the law  
 4 for itself.

5 Similarly misguided is T-Mobile’s contention that the jury should be permitted to award  
 6 restitution or a reasonable royalty as an alternative measure of *contract* damages. According to  
 7 T-Mobile’s latest proposed jury instructions, unjust enrichment and a reasonable royalty are  
 8 permissible alternative measures of restitutionary contract damages. But, prior to last week, T-  
 9 Mobile had never asserted that unjust enrichment or reasonable royalty was available on a claim  
 10 for breach of contract. T-Mobile’s complaint sought “unjust enrichment” and “reasonable  
 11 royalty” on its misappropriation claim but only “expectation damages, consequential damages,  
 12 and incidental damages” on its contract claim. Dkt. 1 at 21. And its initial set of jury  
 13 instructions sought only “actual damages” on its contract claim. T-Mobile’s request for unjust  
 14 enrichment and reasonable royalty on its contract claim is therefore waived.

15 It is also not the law. Under Washington law, restitution “is an alternative remedy to  
 16 damages for breach of contract.” *Dravo Corp. v. L.W. Moses Co.*, 6 Wash. App. 74, 90 (1971).  
 17 But restitution is available only when “the injured party [has] remaining duties to perform under  
 18 the contract,” which is not the case here. *Bailie Commc’ns v. Trend Bus. Sys.*, 53 Wash. App.  
 19 77, 81-82 (1988).

20 Further, the “purpose of restitution is to remedy unjust enrichment.” *Ehsani v.*  
 21 *McCullough Family P’ship*, 160 Wash. 2d 586, 594 (2007). But it is well-settled that “a plaintiff  
 22 who is a party to a ‘valid express contract ...’ may not bring a claim for unjust enrichment for  
 23 issues arising under the contract’s subject matter.” *Minnick v. Clearwire US*, 683 F. Supp. 2d  
 24 1179, 1186 (W.D. Wash. 2010); *Strategic All. Partners v. Dress Barn*, 386 F. Supp. 2d 312, 318  
 25 (S.D.N.Y. 2005). That is why Washington’s jury instructions limit restitution damages to cases  
 26 involving *quasi-contracts* (*i.e.*, contracts implied at law), not to breach of express contract cases,  
 27

1 as here. *See* WPI 303.08. Accordingly, T-Mobile is limited to an award of actual damages on its  
2 breach of contract claim.

3 **II. T-Mobile Must Prove that the Trade Secrets Were Used to Improve Devices Sold by**  
4 **Huawei Device USA**

5 As described above, T-Mobile “has the burden of proving . . . that, as a result of the  
6 misappropriation, [Huawei Device USA] received money or benefits that in justice and fairness  
7 belong to [T-Mobile].” 6A Wash. Practice, Wash. Pattern Jury Instructions Civil, WPI 351.01.  
8 The only possible benefit from the mobile device testing technology at issue in this case arises  
9 from improvements to devices sold by Huawei Device USA. Thus, to prove its case, T-Mobile  
10 must identify concrete improvements made to devices sold by Huawei Device USA as a result of  
11 the alleged misappropriation.

12 In his reports and at his deposition, T-Mobile’s expert Michael Davies identified no such  
13 benefit. Indeed, there is not a single mention of Huawei Device USA in either of Mr. Davies’  
14 expert reports. *See* Dkt. 330-3, 330-4. Mr. Davies offers no opinions regarding acquisition or  
15 disclosure of the trade secrets. Dkt. 330-5 (Davies Tr.) at 69:6-24 (no “opinion specifically on  
16 how they obtained that information,” or whether they “stole” or “obtained it through theft”);  
17 47:14-48:1 (“I have been informed there was disclosure” and “that it is alleged that Huawei  
18 disclosed information” but “don’t recall the specifics” and am not offering those opinions). His  
19 opinions in this area are limited to: (1) whether Tappy contains a T-Mobile trade secret or  
20 confidential information; (2) whether xDeviceRobot incorporates any aspects of Tappy that are  
21 “T-Mobile’s by patents, trade secrets, or other confidential information”; and (3) whether  
22 xDeviceRobot was used to “test” any devices. *See* Dkt. 330-3 ¶ 30, § XIII; Dkt. 330-5 (Davies  
23 Tr.) at 45:3-6, 124:17-22.

24 But xDeviceRobot was neither developed nor used by Huawei Device USA, and Mr.  
25 Davies does not connect the xDeviceRobot testing to any improvements in devices sold by  
26 Huawei Device USA (or any other Huawei entity) from which Huawei Device USA might  
27 benefit. T-Mobile’s failure to prove that Huawei Device USA benefitted from the alleged

1 misappropriation is a fatal gap in its case.<sup>8</sup>

2 To the extent Mr. Davies is allowed to testify,<sup>9</sup> he must be strictly limited to the opinions  
3 disclosed in his reports and should not be permitted to fill this gap *ex post*. See Fed. R. Civ. P.  
4 26(a)(2)(B)(i); Fed. R. Civ. P. 37(c). “The purpose of the expert disclosure rule is to provide  
5 opposing parties reasonable opportunity to prepare for effective cross examination and perhaps

6  
7 <sup>8</sup> T-Mobile USA also lacks any evidence that xDevice Robot was “substantially derived”  
8 from any T-Mobile trade secret. *Mangren Research & Dev. Corp. v. National Chem. Co.*, 87  
9 F.3d 937, 944 (7th Cir. 1996). Robot automation test technology was readily available on the  
10 market and was mastered by Huawei Device China before it developed xDeviceRobot in 2012.  
11 Dkt. 330-6 (Wolfe Report) ¶¶ 123-128. Meanwhile, Tappy and xDeviceRobot are fundamentally  
12 different. Tappy is a SCARA-model robot, and xDeviceRobot is a Cartesian model. Tappy runs  
13 on off-the-shelf third-party software from National Instruments, while xDeviceRobot uses  
14 Huawei Device China’s proprietary xDevice software – software that was developed and in use  
15 by Huawei Device China before the events that gave rise to this case.  
16 Mr. Davies acknowledges these difference but infers causation from the notion that  
17 xDeviceRobot is “functionally equivalent” to Tappy. Dkt. 330-5 (Davies Tr.) at 66:1-68:19,  
18 159:10-25, 223:22-226:8. But misappropriation cannot be inferred simply because two devices  
19 exhibit equivalent functions. There must be some additional evidence of actual copying of a  
20 secret; otherwise, trade secret law would preclude independent development of systems with  
21 equivalent functionality – something it does not do. See *Kewanee Oil Co. v. Bicron Corp.*, 416  
22 U.S. 470, 476 (1974) (“[T]rade secret law . . . does not offer protection against discovery by fair  
23 and honest means.”); *Warehouse Sols., Inc. v. Integrated Logistics, LLC*, No. 1:11-CV-02061-  
24 RLV, 2014 WL 12647878, at \*6 (N.D. Ga. July 7, 2014) (“A user . . . can readily ascertain the  
25 appearance and functionality of the system and, thus, the visible output cannot be a trade  
26 secret.”).

27 As a result, T-Mobile must prove that “defendants could not have [created their device]  
28 without use of [plaintiff’s] trade secret.” *Mangren*, 87 F.3d at 944. This Mr. Davies’s functional  
equivalence opinion does not do. To be sure, it is not the law that “just because Tappy and  
xDeviceRobot are not precisely identical robots, it cannot be shown that misappropriation of  
trade secrets occurred.” Dkt. 334 at 21. A defendant can use and incorporate trade secrets in a  
device without duplicating the plaintiff’s device exactly. But there must be some affirmative  
evidence of copying beyond mere functional equivalence; otherwise a jury could infer  
misappropriation from the fact that a Ford is functionally equivalent to a Chevy. See *Contour  
Design, Inc. v. Chance Mold Steel Co.*, 693 F.3d 102, 110 (1st Cir. 2012) (finding no  
misappropriation because “there is no evidence to establish any connection between [an  
allegedly similar] feature and the allegedly misappropriated information”).

<sup>9</sup> Defendants previously moved to exclude all or part of Mr. Davies’ opinions. See Dkt.  
329. Now that Huawei Device USA is the sole defendant, Mr. Davies’ opinions are even less  
relevant and more likely to confuse the jury. Huawei Device USA submits this is further reason  
to grant its motion in limine. *Id.*

1 arrange for expert testimony from other witnesses.” *Rembrandt Vision Techs., L.P. v. Johnson &*  
 2 *Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) (quotations omitted). Having  
 3 failed to disclose any opinions of improper use by Huawei Device USA, Mr. Davies cannot now  
 4 be allowed to offer any such opinions at trial. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,  
 5 259 F.3d 1101, 1107 (9th Cir. 2001) (affirming exclusion); *Asetek Danmark A/S v. CMI USA,*  
 6 *Inc.*, No. 13-cv-00457-JST, Dkt. 201 Order (N.D. Cal. Dec. 9, 2014); *Med. Instrumentation &*  
 7 *Diagnostics Corp. v. Elekta AB*, 2002 WL 34714563, at \*2 n.1, \*7 (S.D. Cal. Jan. 14, 2002).

### 8 **III. Jury Questionnaire and Voir Dire**

9 The Parties have submitted a special juror questionnaire and preliminary voir dire  
 10 questions for the jury selection process for this trial. Copies of the proposed questionnaire and  
 11 voir dire questions are being filing concurrently. Both sets of jury selection materials would  
 12 provide the Parties with basic information about the members of the panel while identifying  
 13 potential prejudices that may exist against Chinese companies. We would be pleased to discuss  
 14 these materials at the pretrial conference, or at the Court’s convenience.

1 DATED this 7th day of February, 2017.

2 **GORDON TILDEN THOMAS & CORDELL LLP**  
3 Attorneys for Defendants Huawei Device USA, Inc. and  
4 Huawei Technologies Co., Ltd.

5 By s/Franklin D. Cordell

6 Franklin D. Cordell, WSBA #26392  
7 Jeffrey M. Thomas, WSBA #21175  
8 1001 Fourth Avenue, Suite 4000  
9 Seattle, Washington 98154  
Telephone: (206) 467-6477  
Facsimile: (206) 467-6292  
Email: [fcordell@gordontilden.com](mailto:fcordell@gordontilden.com)  
Email: [jthomas@gordontilden.com](mailto:jthomas@gordontilden.com)

10 **STEPTOE & JOHNSON LLP**

11 Attorneys for Defendants Huawei Device USA, Inc. and  
12 Huawei Technologies Co., Ltd.

13 By s/Timothy C. Bickham

14 Timothy C. Bickham\*  
15 James F. Hibey\*  
16 Michael J. Allan\*  
17 Jeffrey M. Theodore\*  
18 Jessica I. Rothschild\*  
19 1330 Connecticut Avenue NW  
Washington, DC 20036  
Telephone: (202) 429-3000  
Facsimile: (202) 429-3902  
Email: [jhibey@steptoe.com](mailto:jhibey@steptoe.com)  
Email: [tbickham@steptoe.com](mailto:tbickham@steptoe.com)  
Email: [jrothschild@steptoe.com](mailto:jrothschild@steptoe.com)

20 William F. Abrams\*  
21 Meg Kammerud\*  
22 Michael Flynn-O'Brien\*  
23 1891 Page Mill Road, Suite 200  
Palo Alto, CA 94394  
Telephone: (650) 687-9500  
Facsimile: (650) 687-9499  
Email: [wabrams@steptoe.com](mailto:wabrams@steptoe.com)  
Email: [mkammerud@steptoe.com](mailto:mkammerud@steptoe.com)  
Email: [mflynnobrien@steptoe.com](mailto:mflynnobrien@steptoe.com)

26 \* Admitted *Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Michael E. Kipling  
Marjorie A. Walter  
KIPLING LAW GROUP PLLC  
3601 Fremont Avenue N., Suite 414  
Seattle, WA 98103  
kipling@kiplinglawgroup.com  
walter@kiplinglawgroup.com

John Hueston  
Alison Plessman  
Eric Hayden  
HUESTON HENNIGAN LLP  
523 West 6th Street  
Los Angeles, CA 90014  
(213) 788-4340  
jhueston@hueston.com  
aplessman@hueston.com  
ehayden@hueston.com

s/ Jessica I. Rothschild  
Jessica I. Rothschild\*  
(\*admitted *pro hac vice*)